Date: June 4, 1997

Case No.: 95-INA-358

In the Matter of:

FAR SHINE BUSINESS CONSULTATION,
Employer

On Behalf Of:

CHING-SHU CHEN,
Alien

Appearance: Kuang Sheng Tuan (Agent)
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 18, 1993, Far Shine Business Consultation America, Inc. ("Employer") filed an application for labor certification to enable Ching-Shu Chen ("Alien") to fill the position of Financial Officer (AF 93-94). The job duties for the position are:

> Direct financial management function; oversee flow of cash receipts, disbursements & financial instruments to meet business and investment needs; prepare profit & loss statements for specified accounting period; audit contracts, orders & vouchers and prepare reports to substantiate individual transaction; develop polices [sic] & procedures for account collections & extension of credit to customers.

The Employer is requiring two years of experience in the job offered. Furthermore, the Employer is requiring that the Financial Officer "be able to communicate Mandarin and Taiwanese languages since 80% of customers are Chinese-speaking."

The CO issued a Notice of Findings on January 28, 1994 (AF 71-81). The CO proposed to deny labor certification for three reasons. First, the CO found that the Employer rejected a U.S. applicant because she could not make an immediate trip to Taiwan. However, this requirement was not listed on the ETA 750A form. In addition, the CO noted that the advertisement called for an accountant and an accounting background also was not listed on the ETA 750A form. As such, the CO found both of these requirements to be unduly restrictive. Second, the CO found that the Employer's foreign language requirement was unduly restrictive. Finally, the CO found that the Employer rejected qualified U.S. applicants for other than lawful, job-related reasons.

Accordingly, the Employer was notified that it had until March 4, 1994, to rebut the findings or to cure the defects noted.

On March 2, 1994, the Employer requested an extension of time to rebut the CO's findings (AF 70). This request was granted on March 8, 1994 (AF 69). The Employer was given until April 20, 1994, to file a rebuttal.

In its rebuttal, dated April 18, 1994 (AF 17-68), the Employer stated that it is not requiring that applicants travel to Taiwan. He also noted that EDD required that the job title be changed from "financial officer" to "accountant." With regards to the foreign language

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

requirement, the Employer asserted that 80% of his customers speak either Mandarin or Taiwanese and that the absence of an employee who can speak these languages would adversely impact the business. In addition, the Employer submitted business cards from some of his customers and previous phone bills indicating calls to China and Taiwan. In addition, the Employer submitted information regarding the percentage of Chinese population in Los Angeles County. With regard to the U.S. applicants, the Employer gave his reasons for rejecting each applicant.

The CO issued the Final Determination on June 8, 1994 (AF 14-16), denying certification because the Employer failed to show the business necessity of the foreign language requirement and he failed to show that three U.S. workers were rejected for lawful, job-related reasons.

On July 11, 1994, the Employer requested review of the Denial of Labor Certification (AF 6-10). In March 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

To establish business necessity for a foreign language, the two-prong standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc)* is applicable. See also, *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc)*. The first prong generally involves whether the employer's business includes clients, co-workers, or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the employee's job duties require communicating or reading in a foreign language.

In the instant case, the Employer is requiring that applicants speak Mandarin and Taiwanese (AF 94). The CO, in the NOF, informed the Employer that this requirement is unduly restrictive (AF 71-81). As such, the CO asked that the Employer explain the following:

1) How will the foreign language be used in the job duties? (What must be explained, & why can't it be explained in English?)
2) Where & when will the language be used & with whom?

3) How was the work completed in the past without the language?

4) Will the absence of the language adversely impact the business?

5) How is the language handled with other ethnic groups?

6) What percentage of the business is dependent on the language?

Moreover, the CO informed the Employer that he could attempt to justify the foreign language requirement as a business necessity, delete the requirement and readvertise or show that the requirement is customary in the United States. Specifically, the CO instructed the Employer that, to establish business necessity, he must establish both prongs of the standard set forth in *Information Industries, supra.* Furthermore, the CO asked that the Employer do the following:

1) Submit a time percentage that the language is used daily.

2) Submit sample letters or customer forms that use the language.

3) Submit copies of invoices with which your company does business.

4) Submit a list of clients who cannot communicate in Mandarin.

5) Submit a list of employees who speak Taiwanese.

6) Submit independent statistical data showing the population amount of persons in your community who speak the foreign language.

7) Submit a map showing where the population that speaks the language is located in relation to the employer's address.

In rebuttal, the Employer answered the CO's first set of questions (AF 17-20). He explained that the applicant will give advice "in all aspects of the business aimed toward Chinese speaking customers who need assistance because of language problems and the difference of doing business in the United States and China." He stated that the language requirement is a business necessity as 80% of his customers speak either Mandarin or Taiwanese. He further asserted that presently the President of the Company speaks excellent English-Mandarin-Chinese and his wife has limited ability. Next, the Employer stated that "currently business is lost because no one [is] available to conduct the business in the language of the customer or deal with the customer's associates in the appropriate language. . . . The absence of the language will adversely impact the business." At the present time, the Employer indicated that he has no intentions of dealing with persons of other ethnic groups. Finally, the Employer asserted that 80% of his business is conducted in Mandarin or Taiwanese, "even when not absolutely required, the language ability is a great advantage." In addition, the Employer submitted copies of business cards which he asserted belonged to his customers (AF 21-29). He also submitted a chart indicating the percentage of Chinese population in Los Angeles County and the increase over the past 10 years (AF 30). Finally, the Employer submitted telephone bills showing numerous calls to Taiwan and China (AF 31-68).

In the Final Determination, the CO continued to find that the foreign language requirement is unduly restrictive. We agree with the CO in this case. As discussed above, *Information Industries* requires the Employer to show that a "significant" portion of its clients speak Chinese or Mandarin. The Board has not quantified what "significant" portion of the foreign-speaking clients justifies business necessity, but it is usually between 80 and 90 percent (*Tel-Ko Electronics,* 88-INA-416 (July 30, 1990) (*en banc)*; *Chris and Cary Enterprises,* 88-INA-134 (Sept. 3, 1991)), although it has been as low as 20 to 30 percent (*Mr. Isak* Sakai, 90-INA-330 (Oct. 31, 1991)). The Board has also held that where the employer is credible and offers evidence that at least a significant portion of its clients are foreign speaking, it need not document that they compromise a particular percentage. *Raul Garcia, M.D., supra.*

In an attempt to show that a significant portion of his business is conducted in Mandarin or Taiwanese, the Employer in this case submitted telephone bills showing calls to China and Taiwan, as well as business cards from individuals who the Employer asserts are his clients (AF 21-68). Furthermore, the Employer included a chart showing the percentage of Chinese in Los Angeles County (AF 30).[2] We emphasize that the Employer has the burden of establishing that a significant portion of his business is, in fact, conducted in Mandarin or Taiwanese. Although we do not doubt that the Employer in this case has Mandarin and Taiwanese-speaking clients, we find that the Employer has not provided sufficient evidence to show that these clients constitute a "significant" portion of his business.

First, the Employer's telephone bills do not provide evidence that the conversations were actually conducted in Mandarin or Taiwanese. Likewise, many of the business cards that the Employer submitted are written in English. Moreover, we have no way of knowing that these individuals are actually the Employer's clients. Furthermore, although the population statistics submitted by the Employer indicate that the Chinese population in Los Angeles County may be significant, this information alone does not establish that a significant portion of the Employer's business is conducted in Mandarin or Taiwanese. Finally, the Employer's statements that 80% of his clients speak Mandarin or Taiwanese, "even when not absolutely required," without supporting documentation, are not sufficient to meet his burden of proof. Although a written assertion constitutes documentation that must be considered under *Gencorp,* 87-INA-659 (Jan. 13, 1988) (*en banc)*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

We further note that the Employer failed to submit specific documentation requested by the CO. For instance, the Employer did not submit sample letters or customer forms that use Mandarin or Chinese or copies of invoices with which the company does business. An employer's failure to produce a relevant and reasonably obtainable document requested by the CO is ground for the denial of certification, especially when the employer does not justify its failure. *Vernon Taylor,* 89-INA-258 (Mar. 12, 1991); *STLO Corporation,* 90-INA-7 (Sept. 9, 1991); *Oconee*

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[2] We note that the Employer submitted additional evidence with his Request for Reconsideration. However, it is well settled that evidence first submitted with the Request for Review will not be considered by the Board. *Capriccio's Restaurant,* 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.,* 90-INA-191 (May 20, 1991); *Kogan & Moore Architects, Inc.,* 90-INA-466 (May 10, 1991). The CO clearly presented the issues in the NOF and the Employer had every opportunity to present all relevant evidence in his rebuttal.

Center Mental Retardation Services; 88-INA-40 (July 5, 1988). We find that the CO's requests for letters, customer forms and invoices was not an unreasonable request. Furthermore, the Employer offered no explanation for his failure to produce these documents.

Accordingly, we find that the Employer has not established that a significant portion of his business is conducted in Mandarin or Taiwanese as required by the first prong of the standard set forth in *Information Industries, supra.* Furthermore, we find that the Employer failed to submit specific documentation requested by the CO and offered no explanation for its failure to do so. As such, we find that it is unnecessary to discuss the Employer's recruitment efforts and his rejection of U.S. applicants. Therefore, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.